Supreme Court, U.S.
FILED

07 - 107 JUL 27 2007

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
PETITIONERS,

v.

TIMOTHY M. COHANE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LINDA J. SALFRANK
JONATHAN F. DUNCAN
SPENCER FANE BRITT & BROWNE LLP
100 WALNUT STREET
SUITE 1400
KANSAS CITY, MO 64106
(816) 474-3100

ELSA KIRCHER COLE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
700 W. WASHINGTON ST.
P.O. BOX 6222
INDIANAPOLIS, IN 46206
(317) 917-6222

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

QUESTIONS PRESENTED

The plaintiff, Timothy M. Cohane, was the men's head basketball coach at SUNY-Buffalo. He brought this action against the National Collegiate Athletic Association under 42 U.S.C. § 1983, seeking $15 million in damages, alleging that the NCAA's report describing the results of its own investigation into rule violations at SUNY-Buffalo deprived him of his liberty interest in his reputation and ability to pursue his chosen occupation. The district court dismissed Cohane's complaint for failure to plead any theory that would support a finding that SUNY-Buffalo's cooperation in the NCAA's investigation "somehow transforms the NCAA's well-established private conduct into state action for purposes of Section 1983." The Second Circuit reversed. The questions presented are:

1. Whether the Second Circuit erroneously held, in conflict with decisions of this Court and other courts of appeals, that the NCAA could be held liable under § 1983 based on allegations that "the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty."

2. Whether this Court should grant, vacate, and remand the Second Circuit's decision in light of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

LIST OF PARTIES

In the court of appeals, the plaintiff/appellant was Timothy M. Cohane, and the defendants/appellees were the National Collegiate Athletic Association ("NCAA" or "Association"), by and through its President, Myles Brand, Tom Hosty, as an NCAA Enforcement Director and as an employee of the NCAA, Stephanie Hannah, as an NCAA Enforcement Director and as an employee of the NCAA, and Jack Friedenthal, as an agent of the NCAA and former Chairman of the NCAA Committee on Infractions. The NCAA is a voluntary, unincorporated association consisting primarily of public and private colleges and universities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. THE "JOINT PARTICIPATION" TEST FOR STATE ACTION SHOULD BE CONFINED 10

A. The Second Circuit's Analysis Conflicts With Decades Of Efforts By This Court To Confine The Joint Participation Test 10

B. The Second Circuit's Application Of The Joint Participation Test Conflicts With The Law Of Other Circuits 15

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE NCAA DID NOT ACT "UNDER COLOR OF LAW" 18

A. A Finding of "State Action" By SUNY-Buffalo Does Not Establish That The NCAA Acted "Under Color Of Law" 18

Page

B. The Circuits Are In Conflict About The Relationship Between State Action And Private Action "Under Color Of Law" 22

C. Cohane Does Not Allege Action By The NCAA "Under Color Of Law" 25

III. AT A MINIMUM, THIS COURT SHOULD GVR IN LIGHT OF *TWOMBLY* 28

IV. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW 30

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 12

American Manufacturers Mutual Insurance Co. v. Sullivan,
526 U.S. 40 (1999) 6, 12, 30

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007) ..... *passim*

Blum v. Yaretsky,
457 U.S. 991 (1982) ..... *passim*

Brentwood Academy v. Tennessee Secondary School Athletic Association,
531 U.S. 288 (2001) 4, 10

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961) 4, 10, 11

Case v. Milewski,
327 F.3d 564 (7th Cir. 2003) 13

Collier v. NCAA,
783 F. Supp. 1576 (D.R.I. 1992) 6

Conley v. Gibson,
355 U.S. 41 (1957) 6

Crissman v. Dover Downs Entertainment Inc.,
289 F.3d 231 (3d Cir. 2002) 17

Davis Oil Co. v. Mills,
873 F.2d 774 (5th Cir.), *cert. denied*,
493 U.S. 937 (1989) 17

Page(s)

DeBauche v. Trani,
191 F.3d 499 (4th Cir. 1999), *cert. denied*,
529 U.S. 1033 (2000) 7, 16

Dennis v. Sparks,
449 U.S. 24 (1980) 12, 13, 30

Edmondson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 11

Flagg Brothers v. Brooks,
436 U.S. 149 (1978) 30

Frazier v. Board of Trustees,
765 F.2d 1278 (5th Cir. 1985), *cert. denied*,
476 U.S. 1142 (1986) 25

Gallagher v. Neil Young Freedom Concert,
49 F.3d 1442 (10th Cir. 1995) 17, 18

Hall v. NCAA,
985 F. Supp. 782 (N.D. Ill. 1997) 6

Harrick v. Board of Regents of University of Georgia,
No. 04-0541, slip op. (N.D. Ga. Apr. 15, 2004) 5

Harvey v. Plains Township Police Department,
421 F.3d 185 (3d Cir. 2005), *cert. denied*,
125 S. Ct. 2325 (2006) 24

Hill v. Langer,
86 Fed. Appx. 163 (6th Cir. 2004) 17

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 11

Page(s)

Jones v. NCAA,
679 So. 2d 381 (La. 1996) 6

Lebron v. National Railroad Passenger Corp.,
513 U.S. 374 (1995) 11, 12, 15

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) ..... *passim*

Lugar v. Edmondson Oil Co.,
639 F.2d 1058 (4th Cir. 1981) 21

Marsh v. Alabama,
326 U.S. 501 (1946) 10

Matthews v. NCAA,
179 F. Supp. 2d 1209 (E.D. Wash. 2001) 6

McRae v. Sweet,
No. 91-CV-1403, 1991 U.S. Dist. LEXIS 18260
(N.D.N.Y. Dec. 13, 1991) 6

Memphis, Tennessee Area Local, American Postal Workers Union v. City of Memphis,
361 F.3d 898 (6th Cir. 2004) 25

Monroe v. Pape,
365 U.S. 167, 172 (1961) 26

NBC v. Communications Workers of America,
860 F.2d 1022 (11th Cir. 1988) 25

NCAA v. Board of Regents of University of Oklahoma,
468 U.S. 85 (1984) 1

NCAA v. Tarkanian,
488 U.S. 179 (1988) ..... *passim*

Page(s)

Perkins v. L[illegible]nderry Basketball Club,
196 F.3d [illegible]1st Cir. 1999) 17, 25

Polk County v. Dodson,
454 U.S. 312 (1981) 30

Proffitt v. Ridgway,
279 F.3d 503 (7th Cir. 2002) 22, 23

Revis v. Meldrum,
--F.3d--, No. 06-5197, 06-5399, 2007 WL 1146460
(6th Cir. Apr. 19, 2007) 17

Rowell v. King,
No. 06-3149, 2007 WL 1207087
(10th Cir. Apr. 25, 2007) 13

Salazar v. NCAA,
No. 8:06cv415, 2007 U.S. Dist. LEXIS 16736
(D. Neb. Mar. 5, 2007) 5

Screws v. United States,
325 U.S. 91 (1945) 26

Sutton v. Providence St. Joseph Medical Center,
192 F.3d 826 (9th Cir. 1999) 23, 24

Tahfs v. Proctor,
316 F.3d 584 (6th Cir. 2003) 25

Tancredi v. Metropolitan Life Insurance Co.,
316 F.3d 308 (2d Cir.), *cert. denied*,
539 U.S. 942 (2003) 24

Tancredi v. Metropolitan Life Insurance Co.,
378 F.3d 220 (2d Cir. 2004) 24

Page(s)

Tarpley v. Keistler,
188 F.3d 788 (7th Cir. 1999) 13

Texaco, Inc. v. Pennzoil Co.,
784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds* 481 U.S. 1 (1987) 15

West v. Atkins,
487 U.S. 42 (1988) 19, 22, 26

Wickersham v. City of Columbia,
481 F.3d 591 (8th Cir. 2007) 25

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV § 1 1

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1

OTHER AUTHORITY

Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*,
75 Cornell L. Rev. 1053 (1990) 6, 18, 21

Laurence H. Tribe, *American Constitutional Law*
§ 18-1 (2d ed. 1988) 18

OPINIONS BELOW

The district court's opinion is available at 2005 WL 2373474 (Pet. App. 6a-20a). The Second Circuit's opinion is reported at 215 Fed. Appx. 13 (Pet. App. 1a-5a).

JURISDICTION

The Second Circuit denied the NCAA's petition for rehearing and rehearing *en banc* on March 29, 2007 (Pet. App. 21a-22a). On June 12, 2007, Justice Ginsburg granted the NCAA's application for an extension of time to file the petition for certiorari to and including July 27, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...." The Fourteenth Amendment provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

The NCAA is a private and voluntary unincorporated association of public and private colleges and universities across the country. It "plays a critical role in the maintenance of a revered tradition of amateurism in college sports," *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984), by adopting and enforcing rules on matters such as academic standards for athletic eligibility, admissions, financial aid, and athletic recruiting. "By joining the NCAA, each member agrees to abide by and to enforce such rules." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

The NCAA's bylaws create a Committee on Infractions, which "supervises an investigative staff, makes factual determinations concerning alleged rule violations," *id.*, and is expressly authorized to "[i]mpose an appropriate penalty ... on a member found to be involved in a major violation ...

or recommend to the Board of Directors suspension or termination of membership, [or . . .]" NCAA Bylaw 19.1.3(d). Member schools have also agreed that "[t]he enforcement policies and procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA enforcement staff, Committee on Infractions or Infractions Appeals Committee during the course of an inquiry." NCAA Bylaw 19.01.3.

In *Tarkanian*, a college basketball coach argued (and the Nevada courts held) that the NCAA was liable under § 1983 as a "joint participant" in state action with a public university, in part because the university had agreed to assist NCAA investigators. Tarkanian argued that "the State's involvement is not merely significant, substantial, and pervasive, it is *essential* to the enforcement of the NCAA's determination and directive," and that "the NCAA *must* utilize state officials [in the investigative process and that] makes the NCAA a joint participant in state action." Br. for the Resp't at 46-47, *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (No. 87-1061). This Court rejected that argument, holding that "the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university." 488 U.S. at 196.

This case presents yet another § 1983 action by a coach against the NCAA, seeking to establish that the NCAA's private investigative activities somehow become state action when assisted by a public university. The expansive theory of state action adopted by the Second Circuit is unsupported by this Court's long-established jurisprudence, is in conflict with other circuits, and warrants review.

Allegations of the Complaint

On August 9, 1999, a Mid American Conference employee sent a letter to the NCAA, confirming a prior phone conversation regarding alleged rule violations at SUNY-Buffalo. Pet. App. 28a. Following a meeting with

University officials on December 3, 1999, Cohane resigned as men's head basketball coach. *Id.* In the spring of 2000, after the basketball season and after some athletes had exhausted their eligibility, the NCAA enforcement staff requested interviews with several student athletes to discuss the allegations against Cohane and SUNY-Buffalo. *Id.* at 30a. Cohane alleges that "[s]tudent-athletes told State officials at SUNY Buffalo that they would not interview with the NCAA enforcement staff. In response, school officials under the control of the NCAA and aiding NCAA misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview [receipt of] their degrees could be at risk." *Id.*

Nearly a year later, on January 29, 2001, NCAA investigators Hosty and Hanna issued a case summary to be used by the Committee on Infractions. Cohane alleges, *inter alia*, that in preparing the case summary Hosty and Hanna relied upon information provided by SUNY-Buffalo that they knew was "coerced, false and otherwise tainted," and that "Hosty and Hanna willfully and recklessly changed testimony in order to implicate plaintiff in alleged rules violations." *Id.* The Committee received that report at its February 9, 2001 hearing. *Id.*

On March 21, 2001, the Committee issued a report of its investigation titled "University at Buffalo, The State University of New York Public Infractions Report," concluding that Cohane was guilty of "major violations," and that he was "'evasive, deceptive and not credible'" and had acted "'contrary to the principles of ethical conduct.'" *Id.* at 31a (quoting Report). The NCAA and SUNY-Buffalo held a press conference where school officials "'accept[ed] the report and its findings in its entirety.'" *Id.* (citation omitted). The NCAA Appeals Committee later found that "'many aspects of the case were troublesome,'" but it did not modify any of the NCAA's findings and conclusions. *Id.* at 32a (citation omitted).

Cohane then filed this suit under 42 U.S.C. § 1983 naming the NCAA, a private entity, and its employees and

agents, as the only defendants. (Cohane later filed a separate suit against the University.) His complaint alleges that the NCAA's investigative report deprived him of his liberty interest in his reputation without due process of law. *Id.* at 33a. He alleges that the NCAA is liable under § 1983 because it "jointly participated ... in a wrongful pattern of wrongful conduct and actions which violated plaintiff's rights." *Id.* He also brought state law claims against the NCAA for tortious inference with contract.

Proceedings Below

1. The NCAA filed a motion to dismiss arguing, *inter alia*, that Cohane's allegations did not distinguish this case from *Tarkanian* and that the "joint participation" theory of state action he relied upon is limited to the facts of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982). Cohane argued that *Tarkanian* was different because there UNLV took the direct step that harmed the plaintiff, whereas here Cohane "assert[ed] that the NCAA itself conducted an unfair investigation, used tainted testimony and coerced student athletes to give false testimony," Pl.'s Mem. of Law in Opp. at 13, *Cohane v. NCAA*, No. 04-CV-181S, 2005 WL 2373474 (W.D.N.Y. Sept. 27, 2005), and "the NCAA's own investigation as conducted of him was corrupt, improper and designed to deprive him of his ability to coach a college team . . . .," *id.* at 7.

The district court rejected Cohane's reliance on *Lugar*'s "joint participation" test, finding that it is limited to prejudgment attachment cases. Pet. App. 17a n.2. It held that Cohane's complaint was not sufficient to allege state action by the NCAA. *Id.* at 17a-18a. The district court also dismissed Cohane's state law tortious interference claims on statute of limitations grounds.

2. The Second Circuit reversed, holding "that the District Court erred in concluding that Cohane could prove no set of facts showing that the NCAA was a 'willful participant in joint activity with the State.'" Pet. App. 3a (quoting *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 296

(2001) (quoting *Lugar*, 457 U.S. at 941)). The Court of Appeals explained that Cohane "argues that the NCAA's March 21, 2001 report of its investigation ... and the University's ratification of the Report's findings, defamed him ...." *Id.* It distinguished *Tarkanian* on the ground that the NCAA and UNLV acted like adversaries—but Cohane alleges that the NCAA and SUNY-Buffalo cooperated. *Id.* at 5a. The Second Circuit also reasoned that in *Tarkanian* "'[t]he NCAA enjoyed no governmental powers to facilitate its investigation,'" whereas "Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena." *Id.* (quoting *Tarkanian*, 488 U.S. at 197). The Second Circuit read Cohane's complaint to allege "that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty," and that "without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane." *Id.* It held that those allegations of willful cooperation *by the University* were sufficient to allege state action by *the NCAA*. *Id.* The court did not require, or find in the complaint, any allegation that the NCAA had willfully participated in any official misconduct by the University.

REASONS FOR GRANTING THE WRIT

This is a simple state law defamation case masquerading as a § 1983 claim. The Second Circuit's decision represents the first time since this Court decided *Tarkanian* 20 years ago that *any* court has held that the NCAA's investigative and enforcement activities could be state action subject to constitutional standards.[1] The court of appeals reached that

---

[1] *See Salazar v. NCAA*, No. 8:06cv415, 2007 U.S. Dist. LEXIS 16736, at *6 (D. Neb. Mar. 5, 2007) ("[T]he ... Supreme Court has previously determined that the NCAA does not act under color of state law for purposes of § 1983."); *Harrick v. Bd. of Regents of Univ. of Georgia*, No. 04-0541, slip. op. at 4 (N.D. Ga. Apr. 15, 2004) ("[N]either the University of Georgia's cooperation with the NCAA investigation nor their compliance with NCAA regulations in that regard convert the NCAA's

remarkable result by combining the lax "no set of facts" pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), which this Court just overruled in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), with an unacceptably loose and malleable interpretation of the "joint participation" test for state action, which this Court has repeatedly attempted to confine to the facts of *Lugar* and *Burton*. The Second Circuit's decision squarely conflicts with precedents of this Court and several other circuits, and highlights the pervasive confusion surrounding the "joint participation" test. *See* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1064 (1990) (noting that the "combination of action by state and private actors has repeatedly led to confused opinions"). This Court's intervention is urgently needed.

First, this case presents the Court with an appropriate and long overdue opportunity to clarify the "joint participation" test for state action. Justices of this Court have been criticizing *Burton* and attempting to limit *Lugar* to its facts for decades. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, this Court chastised the court of appeals for "figuratively throw[ing] up its hands and fall[ing] back on [the] language in our decision in *Burton*," explaining that although *Lugar* "contains general language about 'joint participation' as a test for state action ... its language must not be torn from the context out of which it arose." 526 U.S. 40, 57, 58 (1999). Several courts of appeals have received that message. This case clearly would have been dismissed in the Fourth Circuit, which recognizes

---

actions into state action. In *Tarkanian*, the Court rejected the notion that the university's cooperation with the NCAA ... was tantamount to a partnership agreement or transfer of certain university powers to the NCAA."); *Matthews v. NCAA*, 179 F. Supp. 2d 1209, 1218 (E.D. Wash. 2001) (same); *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997) (same); *Jones v. NCAA*, 679 So. 2d 381, 382 (La. 1996) (same); *Collier v. NCAA*, 783 F. Supp. 1576, 1578 (D.R.I. 1992) (same); *McRae v. Sweet*, No. 91-CV-1403, 1991 U.S. Dist. LEXIS 18260, at *10 (N.D.N.Y. Dec. 13, 1991) (same).

that this Court has "refine[d]" the state action analysis since *Burton* and *Lugar* and that there is no general "joint participation" test for state action. *See DeBauche v. Trani*, 191 F.3d 499, 506-07 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000). But other courts of appeals (like the Second Circuit here) continue to rely on the "general language" of *Burton* and *Lugar* to impose § 1983 liability on private parties, for engaging in wholly private conduct, merely because a state actor was involved in the fact pattern.

This Court may also wish to consider summary reversal. *Burton* and *Lugar* have been expressly limited to their facts, and this Court has never found state action under the bare "joint participation" theory in any other case. The Second Circuit also clearly erred by holding that Cohane's allegations distinguish this case from this Court's decision in *Tarkanian*. A member university's decision to cooperate with rather than oppose an NCAA investigation does not change the basic character of what the NCAA itself does. And Cohane's argument that the NCAA investigation could not have proceeded without the evidence-gathering assistance of SUNY-Buffalo adds nothing new. Tarkanian made that same argument, and this Court rejected it.

Second, this case also presents a related important issue: Whether a finding of joint "state action" necessarily justifies holding the private actor liable in damages under § 1983. The Second Circuit allowed this § 1983 case to go forward against the NCAA, based on public acts committed by *SUNY-Buffalo* during an allegedly "joint" endeavor—and without requiring any allegation or proof that the NCAA conspired to procure those public acts or even knew about them. Joint action with private parties may establish "that the State is *responsible* for the specific [private] conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). But the State's willful participation in joint activity with a private party is not enough to establish that the private party acted "under color of law." If the private actor is not fairly responsible for the alleged misuse of official power, it should not be liable under § 1983.

Unfortunately, unnecessary language in this Court's decision in *Lugar* has made it difficult for the lower courts to draw such distinctions, by suggesting that "state action" and action "under color of law" are interchangeable. That makes sense in the ordinary state action case in which a plaintiff "seeks to hold state officials liable for the actions of private parties." *Blum*, 457 U.S. at 1003. But in cases like this one where the plaintiff is trying to hold the *private* party liable because of the state's involvement in otherwise private conduct, it produces absurd results. Justice Powell, joined by Justice O'Connor and then-Justice Rehnquist, explained in dissent in *Lugar* that conflating public and private responsibility in that manner is "plainly unjust" and "a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with [the] law." 457 U.S. at 944-45 (Powell, J., dissenting).

In this case, the Second Circuit held that state action might be found if "the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty." Pet. App. 5a. But *the university's* alleged decision to use its state powers to assist the NCAA's investigation does not establish that *the NCAA* itself did anything "under color of law" or that it should be held responsible for any alleged abuses of power by the university (which were, of course, beyond its control). The allegation that "without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane," *id.*, might justify a claim against SUNY-Buffalo (and Cohane is now pursuing one) for the consequences of the NCAA's report (assuming the students' rights were violated and that Cohane can litigate on their behalf), but it clearly does not justify a finding that *the NCAA* acted "under color of law" or even did anything wrongful.

If this Court does not strictly confine the "joint participation" theory to the facts of *Burton* and *Lugar*, it should at least revisit the dispute between Justice Powell

and the majority in *Lugar* and clarify that the presence of "state action" by state officials in a joint participation context does not necessarily mean that the private party acted "under color of law." That outcome can be so plainly unjust that several courts of appeals have ignored the problematic language in *Lugar* and recognized that a finding of joint state action does not necessarily make a private actor a proper § 1983 defendant. If this case had arisen in the Seventh Circuit, for example, that court would have held that Cohane's allegations could at most justify a suit against SUNY-Buffalo.

Third, at a minimum, this Court should grant, vacate, and remand this case in light of *Twombly*, which overruled *Conley* and explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65. The Second Circuit reversed here based on the now-overruled "no set of facts" test from *Conley*. Pet. App. 3a, 5a. Cohane's complaint is just like Twombly's. It recites legal conclusions (such as that SUNY-Buffalo officials were somehow "under NCAA control") but does not genuinely allege any *facts* that support those conclusions.

This case has broad significance for all private actors that sometimes work in conjunction with government agencies. And it is tremendously important for the NCAA and college athletics. The NCAA conducts approximately 30 investigations per year, and its bylaws require member schools to cooperate fully in those investigations. Some member schools are private and some are public, but the NCAA's obligations to its members and to student athletes must not change with which school happens to be under investigation. As this Court is well aware, sports arouse intense passions and are a fertile source of litigation. If the NCAA risks § 1983 liability whenever an investigated public school is forthcoming and open with investigators, it will be forced to conduct its investigations and enforcement proceedings under a constant threat of litigation and costly,

time consuming, and extensive discovery, not to mention the potential for fee-shifting awards under § 1983. Such litigation could cripple the Association's ability to enforce the rules that its members have agreed upon.

I. THE "JOINT PARTICIPATION" TEST FOR STATE ACTION SHOULD BE CONFINED

A. The Second Circuit's Analysis Conflicts With Decades Of Efforts By This Court To Confine The Joint Participation Test

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," and "avoids imposing on the State, ... responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. This Court has held that "the State is *responsible* for the specific conduct of which the plaintiff complains" primarily when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State," *Blum*, 457 U.S. at 1004, when a private actor wields traditional sovereign powers, *e.g. Marsh v. Alabama*, 326 U.S. 501 (1946), or when state officers are deeply "entwined" in the private actor's leadership, *Brentwood Acad.*, 531 U.S. 288.

The "willful participant in joint activity with the State or its agents" test applied by the Second Circuit began with *Burton*, which held a private restaurant liable for racial discrimination under § 1983 based on its "symbiotic relationship" with the state parking authority from which it leased space in a public building. This Court concluded that "[t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity," and was particularly disturbed that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a government agency." 365 U.S. at 724-25. On that basis, this Court held both the state and the private restaurant liable under § 1983. However, this Court emphasized the "peculiar facts [and] circumstances"

and explained that "what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with ...." *Id.* at 726. This Court later clarified that *Burton* limited its "actual holding to lessees of public property." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974).

This Court invoked the "joint participation" test again two decades later in *Lugar*, holding that "a private party's joint participation with state officials in the seizure of disputed property" under a pre-judgment attachment statute was state action. 457 U.S. at 941. As in *Burton*, however, this Court carefully limited its holding: "Contrary to the suggestion of Justice Powell's dissent, we do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law.' The holding today, as the above analysis makes clear, is *limited to the particular context of prejudgment attachment.*" *Id.* at 939 n.21 (citation omitted) (emphasis added).

This Court has never again relied on the joint participation theory of *Burton* and *Lugar*, and various opinions have criticized it. In her dissent in *Edmondson v. Leesville Concrete Co.*, joined by Justice Scalia, Justice O'Connor questioned "the continuing vitality of *Burton* beyond its facts." 500 U.S. 614, 636 (1991). And, in her dissent in *Lebron v. National Railroad Passenger Corp.*, Justice O'Connor strongly disapproved of Lebon's argument that Amtrak and the government were "'joint participant[s] in the challenged activity.'" 513 U.S. 374, 409 (1995) (citation omitted). Justice O'Connor explained that:

> [o]ur decision in *Burton*, however, was quite narrow. We recognized "the limits of our inquiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." We have since noted that *Burton* limited its "actual holding to lessees of public property," and our recent decisions in this area

> have led commentators to doubt its continuing vitality, *see, e.g.*, L. Tribe, American Constitutional Law § 18-3, p. 1701, n.13 (2d ed. 1988) ("The only surviving explanation of the result in *Burton* may be that found in Justice Stewart's concurrence.").

Id. at 410 (internal citations omitted). In *Sullivan* seven Justices criticized the court of appeals for having "figuratively thrown up its hands and fallen back on language in our decision in *Burton*," explaining that "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment, and later cases have refined the vague 'joint participation' test embodied in that case." 526 U.S. at 57. The *Sullivan* Court similarly rejected the plaintiffs' reliance on *Lugar*, stating that although *Lugar* "contains general language about 'joint participation' as a test for state action," "its language must not be torn from the context out of which it arose." *Id.* at 57, 58.

The only continuing vitality of the "joint participation" test in this Court's cases, outside the facts of *Lugar* and *Burton*, appears to be in narrowly tailored cases involving express allegations that a private party has conspired with a state official to commit an official act that is obviously unlawful and directly harms the plaintiff. For example, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court found state action in a conspiracy between a restaurant owner and police officer to discriminate on the basis of race by arresting a white school teacher in the company of African-American students. The object of the conspiracy, and the act directly causing the harm, was an official act that (given the then-settled constitutional and statutory law forbidding such discrimination) no reasonable person could believe to be lawful. Similarly in *Dennis v. Sparks*, this Court held private defendants liable under § 1983 where they bribed a state court judge to issue an illegal injunction. 449 U.S. 24, 25-26 (1980); *see also Tarkanian*, 488 U.S. at 197 n.17 (explaining that *Dennis* involved a "corrupt agreement to perform a judicial act"). As Justice Powell explained in dissent in *Lugar* itself, "*Adickes* establishes that a private

party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." 457 U.S. at 954-55.

Cohane's complaint does not allege a conspiracy between the NCAA and SUNY-Buffalo for the University to abuse its official power, let alone a conspiracy to commit official acts that no reasonable person could believe were lawful. (That would have been true even under the lax pleading requirements of *Conley*, but it is undeniable after *Twombly*. *See infra*, at 28). While the Complaint alleges isolated, unsupported "bad facts" against individual NCAA employees, *see* Pet. App. 28a-29a, 30a, 31a (Complaint ¶¶ 30, 35, 37, 39), these allegations either assert bare legal conclusions and/or fail to support the notion "that state officials and the [NCAA] reached an understanding to deny [Cohane] his constitutional rights." *Case v. Milewski*, 327 F.3d 564, 568 (7th Cir. 2003). And Cohane "ha[s] not alleged 'specific facts showing an agreement and concerted action amongst the defendants.'" *Rowell v. King*, No. 06-3149, 2007 WL 1207087, at *3 (10th Cir. Apr. 25, 2007) (McConnell, J.) (citation omitted). Nor does Cohane allege that the *official* acts directly caused him harm. *See Dennis*, 449 U.S. at 28; *Tarpley v. Keistler*, 188 F.3d 788, 792 n.2 (7th Cir. 1999) (noting that in *Adickes* and *Dennis* "the state actor's actions unquestionably caused the injury"). As Cohane makes plain, here "[t]he decisive step was the [NCAA's] March 21, 2001 ... Public Infractions Report." Pet.'s Reply Br. at 5, *Cohane v. NCAA*, 215 Fed. Appx. 13 (2d Cir. 2007) (No. 05-5860).

As this Court recognized in *Tarkanian*, the adversarial nature of the NCAA's investigation and enforcement activities precludes any inference of conspiracy from joint action. "[T]he NCAA is properly viewed as a private actor *at odds with the State* when it represents the interests of its entire membership in the investigation of one public university." 488 U.S. at 196 (emphasis added). This investigation was similarly adverse to SUNY-Buffalo's interests, and the University suffered sanctions. Cohane

claims this case is different because SUNY-Buffalo complied with the terms of its membership in the NCAA by cooperating with the investigation, and because that cooperation was allegedly essential to the result. But coach Tarkanian also argued to this Court that UNLV had cooperated with and lent its assistance to the NCAA investigation,[2] and that "the State's involvement is not merely significant, substantial, and pervasive; it is *essential* to enforcement of the NCAA's determination[s] ... Thus, the NCAA *must* utilize state officials to discipline state employees connected with intercollegiate athletics. That utilization makes the NCAA a joint participant in the state action." Br. for the Resp't at 46-47, *Tarkanian*, 488 U.S. 179 (No. 87-1061). This Court rejected all of those arguments in *Tarkanian* and it should do so again here. Surely whether the NCAA's investigations are conducted "under color of law" cannot turn on whether a public university complies with its membership obligations robustly or begrudgingly.

This Court and the lower courts have found the "joint participation" test for state action so troubling because "willful participation in joint activity" between public and private actors is common. It occurs, for example, whenever a private actor invokes routine state assistance (such as by filing a lawsuit or calling the police), or the state chooses to assist private activity for its own reasons (such as by a funding subsidy, or joining a private sports league). This is "a problem that the Court recognized in *Burton* itself," and accordingly since then has adopted "[a] more refined inquiry" such that "[t]he conduct of a private party is not

---

[2] Br. for the Resp't at 11, *Tarkanian*, 488 U.S. 179 (No. 87-1061) (pointing to the NCAA's letter to UNLV's president asking for his "cooperation and assistance to the end that complete information related to this matter may be developed"); *id.* at 15-16 (explaining that "the 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which, when implemented, is designed to place the responsibility for determining the facts on the shoulders of both the institution and the enforcement staff ... to assist the Committee on Infractions in arriving at appropriate judgments").

subject to constitutional scrutiny if the challenged action results from the exercise of private choice ...." *Lebron*, 513 U.S. at 411-12 (O'Connor, J., dissenting). "Given the pervasive role of Government in our society, a test of state action predicated upon public and private 'interdependence' sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities." *Id.* at 411. The Second Circuit's conclusion that the NCAA would be liable under § 1983 if Cohane "could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty," Pet. App. 5a, committed precisely the error for which this Court criticized the Third Circuit in *Sullivan*: relying on the "general language" of *Burton* and *Lugar*, "torn from the context out of which it arose." Indeed, petitioners respectfully submit that this Court's limitations on the "joint participation" theory, and its application of these principles in this specific context in *Tarkanian*, are clear enough that summary reversal would be appropriate here.

B. The Second Circuit's Application Of The Joint Participation Test Conflicts With The Law Of Other Circuits

The Second Circuit's decision in this case also conflicts with the law of other circuits and highlights the considerable confusion and disarray that have been produced by this Court's inconsistently applied pronouncements about the "joint participation" test. Even prior to *Cohane*, the Second Circuit rejected this Court's efforts to limit *Lugar*, holding that "[t]o limit the *Lugar* rationale to prejudgment attachments would violate the precept that § 1983 provides a remedy 'as broad as the protection of the Fourteenth Amendment affords the individual.'" *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1146 (2d Cir. 1986) (citation omitted), *rev'd on other grounds*, 481 U.S. 1 (1987). Several circuits, however, including at least the First, Third, and Fourth, have questioned the continuing vitality of the joint participation test. The Fourth Circuit has held that *Burton* and *Lugar* are both confined to their facts and that the joint

participation test has no broader application. The Fifth and Sixth Circuits have explicitly limited the holding of *Lugar* to the narrow context of prejudgment attachment.

In *DeBauche*, the Fourth Circuit considered a claim by a candidate for governor that she had been unconstitutionally excluded from a debate organized by former governor Douglas Wilder with the help of Virginia Commonwealth University, and that Wilder and several radio stations were liable as a "joint participants" with VCU. The Fourth Circuit explained that "DeBauche's argument does not account for the actual holding in *Burton* nor the Supreme Court's later refinements which explain what is required to convert private action into state action," and that *Burton* "certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment." 191 F.3d at 507. The court held that a private party is deemed to be a state actor under only four circumstances:

> (1) when a state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Id. It then explained that "[h]owever these facts are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action." *Id.* at 508. Cohane obviously could not have satisfied any of the Fourth Circuit's "exclusive" tests for state action, yet the NCAA is forced to defend such claims in the Second Circuit.

Other circuits have been less clear in delineating the "exclusive" circumstances that will support a state action finding, but have nonetheless made clear that the "joint participation" language of *Burton* and *Lugar* should not be extended beyond the facts of those cases. In *Crissman v.*

Dover Downs Entertainment Inc., the *en banc* Third Circuit held that "while *Burton* remains good law, it was crafted for the unique set of facts presented, and we will not expand its reach beyond facts that replicate what was before the Court in *Burton*." 289 F.3d 231, 242 (3d Cir. 2002). The First Circuit refused to find a private basketball league liable under § 1983 based on its "joint participation" with county officials in running basketball tournaments, explaining that in later cases this Court "has either distinguished or ignored *Burton*'s broadest language." *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 20 (1st Cir. 1999). And the Fifth and Sixth Circuits have held that *Lugar* is limited to the context of prejudgment attachment. *See Davis Oil Co. v. Mills*, 873 F.2d 774, 780 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989) ("[t]o the extent that *Lugar* adopts a low threshold to establish joint participation between a private party and the state, its holding has been confined to the context of ex parte prejudgment proceedings."); *Revis v. Meldrum*, --F.3d--, No. 06-5197, 06-5399, 2007 WL 1146460, at *14 (6th Cir. Apr. 19, 2007) (declining "to extend the relatively low bar of *Lugar*'s so-called 'joint action' test outside the context of challenged prejudgment attachment or garnishment proceedings"); *Hill v. Langer*, 86 Fed. Appx. 163, 167 (6th Cir. 2004) ("the 'joint action' theory adopted in *Lugar* is an exception limited to prejudgment attachments, and we reject [the] invitation to expand this exception beyond those narrow limits"). None of those circuits would have allowed these allegations to proceed.

The law in still other circuits reflects considerable disarray and *ad hoc* blending of "joint action" and true conspiracy principles. For example, the Tenth Circuit applies a "joint action" test which "examine[s] whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995). In *Gallagher*, the court canvassed the approaches in the court of appeals, explaining that some courts employ a "conspiracy approach" where "state action

may be found if a state actor has participated in or influenced the challenged decision or action," while others "hold that, if there is a 'substantial degree of cooperative action' between state and private officials, or if there is 'overt and significant state participation' in carrying out the deprivation of the plaintiff's constitutional rights, state action is present." *Id.* at 1454 (citations omitted). This confusion illustrates the need for this Court's review.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE NCAA DID NOT ACT "UNDER COLOR OF LAW"

A. A Finding of "State Action" By SUNY-Buffalo Does Not Establish That The NCAA Acted "Under Color Of Law"

Even if the assistance provided by SUNY-Buffalo to the NCAA's investigation was significant enough that it would be fair to say "the State is *responsible* for the specific conduct of which the plaintiff complains," *Blum*, 457 U.S. at 1004, that might justify holding *the state* responsible for the allegedly defamatory consequences of the otherwise private NCAA Report—but it cannot possibly justify imposing § 1983 liability on *the NCAA* in the absence of any showing that the NCAA itself did anything other than proceed with its ordinary investigative processes, which this Court has already held to be private in nature. Snyder, *Private Motivation*, 75 Cornell L. Rev. at 1063 ("Separating state action from private action is necessary," not only to determine whether a violation of the fourteenth amendment has occurred, but also to "allocate" liability properly.); Tribe, *American Constitutional Law* § 18-1, at 1689 n.10 (2d ed. 1988) (explaining that it is "sometimes relevant" to consider "the target of the remedy sought by the litigant challenging an alleged state action"). Remarkably, however, an ill-considered generalization in this Court's opinion in *Lugar* has makes it difficult for the lower courts to draw such sensible distinctions. *See Snyder, Private Motivation*, 75 Cornell L. Rev. at 1075 (describing *Lugar*'s "artificial and needlessly confusing approach"). Over a strong and

persuasive dissent by Justice Powell, joined by Justices O'Connor and Rehnquist, this Court suggested in *Lugar* that any conduct that is "state action" is also therefore action "under color of law" by the private party for § 1983 purposes. That reasoning was unnecessary to the result in *Lugar*,[3] and has profoundly unfair consequences. This Court should correct the misapprehensions it has produced.

A person ordinarily acts under color of law only if he has "exercised 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). "State action" and action "under color of law" are obviously closely related concepts, and in the great majority of § 1983 cases the generalization in *Lugar* is either correct or harmless. If the plaintiff seeks only declaratory or injunctive relief against an unconstitutional law or policy, whether the defendant is a private actor or a state official is of little consequence. And if a state official is the only party alleged to have violated the plaintiff's rights, or when the plaintiff "seeks to hold state officials liable for the actions of private parties" because the state's involvement makes it "*responsible* for the specific conduct of which the plaintiff complains," *Blum*, 457 U.S. at 1003-04, then the official clearly acted "under color of law" and is a proper defendant.

But this Court recognized in *Blum* that ordinary § 1983 cases against public officials are "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State." 457 U.S. at 1003; *id.* at 1009 n.20 (stating that *Blum* "of course, does not involve the 'under color of law' requirement of § 1983"). The problem is simple

---

[3] Pre-judgment attachment allows private parties to exercise what is tantamount to a traditional state power without any meaningful oversight by the state officials themselves. A finding that the private party acted "under color of law" could be justified in those terms (although Justice Powell's dissent is powerful). This Court has held that *Lugar* is limited to the "unique" context of pre-judgment attachment, supporting that view.

and intuitive. Even if a court determines that private action "must in law be deemed to be that of the State," *id.* at 1004, and that the state can "fairly be blamed" for it, *Lugar*, 457 U.S. at 936, the private party may have wielded no power "made possible only because the wrongdoer is clothed with the authority of state law," *West*, 487 U.S. at 49, and holding the private party liable in damages may be patently unjust. Cohane is now pursuing a separate action against University officials. *See Cohane v. Greiner*, No. 03-CV-0322 (E.D.N.Y filed Jan. 17, 2003).

Imagine a state official who "exercis[es] coercive power" to force a private employer to fire an employee because the official disapproves of the employee's speech. The official has violated the First Amendment, but the employer has done only what it had every right to do if the state were not involved—and the state involvement that makes the firing into a constitutional issue was beyond the employer's control and against its will. And as Justice Powell saw the facts in *Lugar*, the defendant "did no more than commence a legal action of a kind traditionally initiated by private parties" and "could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a 'state actor' liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia." 457 U.S. at 945-46. If one views *ex parte* attachment procedures that way, Justice Powell was correct that the private party should not be liable.

As Justice Powell explained, "[w]here private citizens interact with state officials in the pursuit of merely private ends," a reviewing court must determine whether the "allegation of wrongful 'conduct that can be attributed to the State'" for purposes of state action "fairly can be attributed to the [private defendant]" as well. *Id.* at 948. In other words, the court must determine whether the private party is fairly responsible for the state-power aspects of the joint activity that caused the court to find state action. If not, there may be joint private/public activity, and state action by the state, but no state action or action "under color of

law" for which the private party is responsible. *See* Snyder, *Private Motivation*, 75 Cornell L. Rev. at 1094 ("private and state action may intersect and result in the deprivation of constitutional rights ... [b]ut the state action and private conduct must be separated analytically"). One can say either that the private party has not engaged in "state action" or become a "state actor," or that he has done nothing "under color of law;" the wording matters little, and Justice Powell uses both formulations. The critical point is that the private party may not be responsible for any constitutional injury even if (perhaps especially if) it is that private party's own conduct that supplies the "state action" by the state official. In the employer hypothetical above, for example, the employer's firing is state action but (due to official coercion) it is state action or action "under color of law" *attributable to the state official* rather to the employer.

The Fourth Circuit's opinion in *Lugar* (described by Justice Powell as "excellent"), correctly explained that "joint participation" cases require "separate consideration of the two requirements. ... [T]he involvement of a state official provides ... the state action ... but it does not resolve nor even touch upon the further question whether the private defendant's contributing conduct was taken under color of law." 639 F.2d 1058, 1064 (4th Cir. 1981); *see also id.* at 1065 ("to find state action 'provided' in this pattern by the 'involvement' of state officials in the totality of conduct that resulted in a deprivation of [a] secured right does not decide, nor even address, the separate question whether the private conduct of a particular defendant which was also involved to some extent was under color of state law"). Justice Powell and the other dissenters agreed with the Fourth Circuit that by conflating the two inquiries, "the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of 'state action' and private action 'under color of law.'" 457 U.S. at 946.

Lugar has confused the lower courts because the opinion seems to suggest that if a private party's conduct is state

action (*i.e.*, if it is "fairly attributable" to the state) then the private party is automatically responsible for that state action and has acted "under color of law" for purposes of § 1983. Any such suggestion was unnecessary to the result in *Lugar*, is plainly incorrect, and should be rejected. The correct analysis in "joint participation" settings is that where a private party does not wield any delegated state power he acts "under color of law" only if he conspires with state officials to induce them to violate their official duties, as in *Dennis*, or "when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity," *id.* at 955 (discussing *Adickes*). As explained above, Cohane does not genuinely allege anything like that.

B. The Circuits Are In Conflict About The Relationship Between State Action And Private Action "Under Color Of Law"

The majority's apparent conflation of the "state action" and "under color of law" inquiries in *Lugar* produces results that are so plainly unjust in certain settings that various courts of appeals have declined to read *Lugar* to require that conclusion. There is an active circuit split over whether a finding of state action necessarily justifies the conclusion that the action was "under color of law" sufficient to impose § 1983 liability on a private actor. If this case had arisen in the Seventh, Ninth, or Third Circuits, for example, it would have been dismissed on the ground that even if state action is present the NCAA is not a proper defendant.

The Seventh Circuit has refused to hold that a private party is a proper defendant in a § 1983 action involving allegations of "joint participation," notwithstanding the clear presence of state action by a state official, unless the private conduct falls within two categories. *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002). First, a private party may be held liable for conspiring with a state official to commit an official act that directly deprives the plaintiff of her constitutional rights (*e.g. Dennis* or *Adickes*), or "[s]econd, the private citizen may have become a public

officer pro tem." *Id.* Judge Posner, writing for the court, rejected the dissent's argument that under this Court's cases (particularly *Lugar*) the private party was liable because it and the state official "engaged in concerted action with a common goal." *Id.* at 509 (dissent). The dissent argued that the private party could be held liable if "the state ... is aware of the participation of the private individual and 'effectively directs, controls, or encourages the actions of the private party.'" *Id.* at 510 (dissent) (citations omitted). In short, the dissent argued that the test for determining whether the private party acted under color of law is the same as for whether the state is responsible for the private conduct. The majority wisely rejected this argument. This case would have to be dismissed under its reasoning.

Several court of appeals cases have embraced the insight that if state action is found on the ground that government officials *coerced* the private conduct, that should support an action against the state but not against the private party. The Ninth Circuit explained that "[t]he [*Blum*] compulsion analysis originated in cases in which the government itself, not a private entity, was the defendant," and holds only that when the government compels a private party to act, *the government* can be held liable under § 1983 for the private conduct. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836 (9th Cir. 1999). In *Sutton*, "Plaintiff did not bring this action against the [] government ... [instead] he sued a private employer." *Id.* at 837. The plaintiff argued, consistent with *Lugar*, that if the employer's conduct is state action under *Blum*, that is also enough "to hold [the] private employer responsible" under § 1983. *Id.* The Ninth Circuit sensibly disagreed, explaining that *Blum*'s compulsion test establishes "that *the government* cannot escape liability when it compels a result, even though the government does not actually engage in the unlawful act but, instead, pressures another to do so. In such circumstances, the state is undeniably the party who is 'responsible' for that act. By contrast, in a case involving a

private defendant, the mere fact that the government compelled a result does not suggest that the government's action is 'fairly attributable' to the private defendant." *Id.* at 838. That was Justice Powell's reasoning in dissent in *Lugar*, and it applies with equal force where (as here) a plaintiff seeks to hold a private party liable under a "joint participation" theory. The Ninth Circuit would therefore dismiss this case on the ground that SUNY-Buffalo's state action is not "fairly attributable" to the NCAA.

The Third Circuit has also recognized that it would be illogical to hold that a private party is a proper defendant where the state has coerced or encouraged the private party into acting. *See Harvey v. Plains Township Police Dep't*, 421 F.3d 185, 195 (3d Cir. 2005), *cert. denied*, 125 S. Ct. 2325 (2006). The Court "stress[ed] that by stating that a private actor is not engaged in state action simply because she is compelled to take an action by a state actor, we are not suggesting that the action itself may not be attributed to the state. Indeed, it seems entirely proper to find that the state actor engaged in state action, including whatever actions the private party was compelled to undertake." *Id.* at 195 n.13. That makes perfect sense, but it is hard to reconcile with the majority's language in *Lugar*.

In conflict with the Third, Seventh, and Ninth Circuits, some circuits, including the Second, Fifth and Eleventh, have held that *Lugar* precludes such distinctions. The Second Circuit has previously held both that "[i]n order to satisfy the state action requirement where the defendant is a private entity, the allegedly unconstitutional conduct must be 'fairly attributable' to the state," *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir.), *cert. denied*, 539 U.S. 942 (2003), and that "[i]f a defendant's conduct satisfies the state action requirement under the Fourteenth Amendment, then that conduct also constitutes action 'under color of' state law for purposes of § 1983," *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004). The Second Circuit apparently followed that circuit precedent here as well; after finding sufficient allegations of "willful

participation" by the University it did not separately analyze whether Cohane alleged action by the NCAA "under color of law."

Similarly, the Eleventh Circuit has explained that "[w]hile specifically the *Blum* court spoke of holding the state liable pursuant to the state action doctrine, the standard remains constant when a party seeks to hold a private actor liable under the state action doctrine." *NBC v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1025 n.4 (11th Cir. 1988). The Fifth Circuit has held that "*Blum* ... involved an effort to hold state officials liable for the conduct of private parties .... While the present suit ... [involves a private defendant], the analysis of state action under either brand of facts is largely if not wholly the same." *Frazier v. Bd. of Trustees*, 765 F.2d 1278, 1284-85 n.12 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986). In *Perkins*, 196 F.3d at 17-19, the First Circuit stated that "the Fourteenth Amendment's 'state action' requirement is coextensive with section 1983's 'under color of law' requirement" and it applied ordinary state action tests to determine whether a private basketball club could be held liable under § 1983. 196 F.3d at 17-19 n.1. The Eighth and Sixth Circuits have applied the same misguided reasoning. *See Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) ("If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken 'under color of state law' for purposes of § 1983"); *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004) ("When a defendant is a private entity, this circuit recognizes three tests for determining whether its conduct is fairly attributable to the state ...."); *Tahfs v. Proctor*, 316 F.3d 584, 591 (6th Cir. 2003) (applying tests for determining whether conduct is fairly attributable to the government to determine whether private party acted under color of law).

C. Cohane Does Not Allege Action By The NCAA "Under Color Of Law"

Cohane does not allege any facts that would establish

that the NCAA is responsible for SUNY-Buffalo's state action or that the NCAA issued its Infractions Report under color (or "pretense," *see Screws v. United States*, 325 U.S. 91, 111 (1945)) of law. The NCAA did not "exercise[] 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *See West*, 487 U.S. at 49 (citation omitted). Its ability to issue a report of its investigation into a violation of its rules is not made possible only because it is clothed with some state authority; nor can it be said that the NCAA "brought the force of the State to bear against the § 1983 plaintiff." *See Blum*, 457 U.S. at 1013 (Brennan, J., dissenting). This Court has already held that when the NCAA investigates and enforces its rules against a particular school, it does not act under color of law. As in *Tarkanian*, there is nothing in this case that could establish that the NCAA "carr[ied] a badge of authority of [the] State [of New York] and represent[ed] it in some capacity." 488 U.S. at 191 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). Any injury to Cohane's reputation is—as he makes plain—directly the result of the *NCAA's private report*, and the NCAA did not issue its report under color of law. Despite Cohane's conclusory allegations about the joint press conference, the NCAA was not acting for the university and the persuasiveness of its report certainly was not enhanced by any special power conferred by the state.

The closest Cohane comes to an allegation that the NCAA acted "under color of law" is his bare allegation that SUNY-Buffalo officials were somehow acting under the "control" of the NCAA when they allegedly pressured students to cooperate with the NCAA's evidence-gathering. But a careful review of Cohane's complaint reveals that the "control" he alleges is simply the University's own desire to comply with the NCAA bylaws and remain a member of the Association. This Court has already held that the NCAA does not control or coerce public universities in any manner that would make the NCAA *responsible* for the university's conduct, merely because the consequences of withdrawing

from the NCAA are unpalatable. Coach Tarkanian argued that "the power of the NCAA is so great that UNLV had no practical alternative to compliance with its demands." *Tarkanian*, 488 U.S. at 198. This Court acknowledged that "nonmembership in the NCAA obviously would thwart" UNLV's "desire to remain a powerhouse among the Nation's college basketball teams," but "that UNLV's options were unpalatable does not mean that they were nonexistent." *Id.* at 198 & n.19. And "even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99. This Court also squarely rejected the notion that its public university members "delegate" state power to the NCAA in any meaningful sense. "UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself." *Id.* at 195-96.

Even if Cohane's allegations are accepted as true and SUNY-Buffalo officials warned students that a refusal to cooperate with an NCAA investigation could imperil their degrees, SUNY-Buffalo issued those warnings not the NCAA. The Second Circuit tried to distinguish *Tarkanian* on the ground that there "'[t]he NCAA enjoyed no governmental powers to facilitate its investigation,'" whereas here "Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena." Pet. App. 5a (citation omitted). But in the absence of sufficient allegations of a conspiratorial agreement, the fact that the University exercised state power does not mean the NCAA did. The NCAA itself did nothing more than participate in interviews, receive evidence, and issue the report that Cohane contends defamed him. If misconduct by SUNY-Buffalo "caused" the NCAA to issue its report (in the narrow sense that, as Cohane alleges, the NCAA would

not have been able to complete its investigation "but for" that misconduct), that might justify a conclusion that the damages recoverable against SUNY-Buffalo embrace all of the foreseeable consequences of its alleged misconduct. But none of this means that the NCAA itself assumed any state authority or did anything "under color of law."

III. AT A MINIMUM, THIS COURT SHOULD GVR IN LIGHT OF *TWOMBLY*

If this Court does not grant certiorari in this case or summarily reverse, the NCAA respectfully submits that it should grant, vacate, and remand the Second Circuit's decision in light of *Twombly*. The Second Circuit explained that it could affirm the district court's judgment only if "'it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.'" Pet. App. 2a (citation omitted) (emphasis added). It then went on to hold "that the District Court erred in concluding that Cohane could prove *no set of facts*" to satisfy the "joint participation" test. *Id.* at 3a (emphasis added). This "no set of facts" language comes from *Conley v. Gibson*, but in *Twombly* this Court held that "this famous observation has earned its retirement." 127 S. Ct. at 1969.

Twombly was an antitrust conspiracy case in which the plaintiff had alleged a "'compelling common motivation,'" *id.* at 1962 (citation omitted), that the defendants "'entered into a contract, combination or conspiracy,'" and that the defendants "'agreed not to compete with one another.'" *Id.* at 1970 (citations omitted). This Court found these allegations insufficient and reversed the Second Circuit. It held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65. Instead, stating an antitrust conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. "[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 1966.

This Court explained that *Conley*'s "'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard." *Id.* at 1968. Like this case, *Twombly* arose in the Second Circuit, and the court of appeals held that to dismiss the complaint "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion ...." *Id.* at 1963 (citations omitted). This Court explained that on the Second Circuit's "focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." *Id.* at 1968-69 (alteration omitted).

Cohane's complaint is just like Twombly's. It uses labels and conclusions, and a formulaic recitation of the elements of a cause of action, but it does not allege any *facts* that would suggest a genuine conspiracy between the NCAA and SUNY-Buffalo to jointly participate in depriving Cohane of his rights. Cohane makes all sorts of conclusory allegations, but has no factual support for any of them. He alleges that school officials were under the "control" of the NCAA, but never specifies how or in what sense or identifies any relevant facts. He alleges that in the course of its investigation the NCAA used and relied upon information that it knew to be "coerced, false and otherwise tainted"—but he never specifies what that information was, why it was false, or how it was otherwise tainted. He alleges that the NCAA and school officials "did engage in a wrongful pattern of wrongful conduct and actions"—but he does not explain precisely what this conduct might have been (other than the cooperative investigative and enforcement process required by NCAA bylaws and found unobjectionable by

this Court in *Tarkanian*), and he certainly does not identify any facts that would support a conclusion that this alleged wrongful conduct was the product of an unlawful conspiracy. The Complaint is woefully insufficient under *Twombly*.

IV. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW

Cohane's allegations add nothing to Tarkanian's, and can be pled by any coach or player who believes himself harmed by the results of an NCAA investigation of a public institution. The prospect of costly and time consuming discovery (and fee awards under §1983) based on "joint participation" theories would have a crippling effect on the NCAA's ability to regulate college athletics nationwide. The Second Circuit noted that "the NCAA may be able to rebut [Cohane's] claims" after discovery. Pet. App. 5a. But the proper time to address these deficiencies is now, as the district court did, on the NCAA's motion to dismiss. *See, e.g., Sullivan*, 526 U.S. 40 (reviewing state action decision after 12(b)(6) dismissal); *Lugar*, 457 U.S. 922 (same); *Polk County v. Dodson*, 454 U.S. 312 (1981) (same); *Dennis*, 449 U.S. 24 (same); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (same). "It is no answer to say," as this Court recognized in *Twombly*, "that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process," or at summary judgment or trial. 127 S. Ct. at 1967. Allegations of joint participation in this context must fail as a matter of law. Allowing them to proceed past the motion to dismiss stage will intolerably invade the sphere of private freedom that the state action and "under color of law" doctrines are supposed to protect, will mire the NCAA in endless and unnecessary litigation, and will force the NCAA to conduct all of its investigations (and other operations) under the shadow of constitutional requirements that were never meant to apply to private entities.

CONCLUSION

The petition for certiorari should be granted, and the judgment should be reversed or vacated for reconsideration.

Respectfully submitted,

LINDA J. SALFRANK
JONATHAN F. DUNCAN
SPENCER FANE BRITT & BROWNE LLP
100 WALNUT STREET
SUITE 1400
KANSAS CITY, MO 64106
(816) 474-3100

ELSA KIRCHER COLE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
700 W. WASHINGTON ST.
P.O. BOX 6222
INDIANAPOLIS, IN 46206
(317) 917-6222

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200